

DISQUALIFICATION & DISCLOSURE

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DISQUALIFICATION & DISCLOSURE¹

I. DISQUALIFICATION ON A JUDGE'S OWN MOTION

A. CANON 3E(1), FLA. CODE OF JUD. CONDUCT

Canon 3E(1), Florida Code of Judicial Conduct, requires a judge to disqualify herself or himself when the judge's impartiality might reasonably be questioned including, but not limited to when:

1. the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; or
2. the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; or
3. the judge knows he or she (or his or her spouse, parent, child, or other member of the judge's household) has an economic interest in the subject matter in controversy or is a party or has more than a *de minimis* interest that could be substantially affected by the proceeding; or
4. the judge or judge's spouse, or a person within the third degree of relationship of them, or that person's spouse:
 - a) is a party to the proceeding or an officer, director or trustee of a party;
 - b) is acting as a lawyer in the case;
 - c) is known by the judge to have more than a *de minimis* interest that could be substantially affected by the proceeding;
 - d) is to the judge's knowledge, likely to be a material witness in the proceeding.
5. The judge's spouse or a person within the third degree of the relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.
6. The judge, while a judge or a candidate for judicial office has made a public statement that commits or appears to commit the judge with respect

¹ This outline has been adopted and modified from the Outline entitled DISCLOSURE, DISQUALIFICATION, AND EX PARTE COMMUNICATIONS, prepared by the Honorable Judge Daniel T. K. Hurley, United States District Court for the Southern District of Florida and the Honorable Judge John Antoon II, United States District Court for the Middle District of Florida.

to parties or classes of parties in the proceeding; an issue in the proceeding; or the controversy in the proceeding.

B. DUTY TO DISCLOSE VS. DUTY TO DISQUALIFY

The duty to disclose is broader than the duty to disqualify. (Note – disclosure should always be on the record or in writing.)

1. The commentary to Canon 3E(1) states, if a judge makes a disclosure, it is not necessarily a basis for disqualification.
2. In the past there was a presumption that, if a matter was important enough to require disclosure, it would constitute a sufficient factual basis to support a motion to disqualify under rule 2.330 (former 2.160), Florida Rules of Judicial Administration.
3. The Code was amended by the Supreme Court in In re Code of Judicial Conduct, 659 So. 2d 692 (Fla. 1995), and now the judge who makes a disclosure is not automatically subject to disqualification. JEAC Op. 03-22. The issue should be addressed on a case-by-case basis. E.g., W.I. v. State, 696 So. 2d 457 (Fla. 4th DCA 1997) (Judge not required to disqualify upon disclosure that she had a friendship with juvenile's caseworker).

The commentary to 3E(1) states that a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no a real basis for disqualification.

If a lawyer or party has previously filed a complaint against the judge with the JQC, that fact does not automatically require disqualification of the judge. Fla. Code Jud. Conduct, Canon 3E(1) Commentary.

4. If the Judge offers to the parties to recuse himself/herself, then the judge must fulfill the offer if one of the parties accepts it. Deloach v. State, 911 So. 2d 888 (Fla. 1st DCA 2005).

C. PLAIN LANGUAGE OF CANON 3E IS NOT EXCLUSIVE

The plain language of Canon 3E is not exclusive. For example, Fla. JEAC Op. 99-13 states that a judge currently represented by an attorney must automatically recuse himself or herself whenever the attorney or members of his firm appear before the judge even if the matter is an uncontested matter such as a default mortgage foreclosure or uncontested dissolution of marriage.

D. REMITTAL – CANON 3F, FLA. CODE OF JUD. CONDUCT

REMITTAL: A judge disqualified by the terms of Canon 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding. Fla. Code Jud. Conduct, Canon 3F.

As a practical matter a judge may wish to have all parties and their lawyers sign the remittal agreement although the commentary indicates that parties may act through counsel if counsel represents on the record that the party has been consulted and consents. Fla. Code Jud. Conduct, Canon 3F, Commentary.

II. DISQUALIFICATION UPON MOTION OF COUNSEL/ LITIGANT

Fla. R. Jud. Admin. 2.330 (Note: Although rule 2.330 is entitled "Disqualification of Trial Judges," it also applies to a trial judge sitting as a circuit appellate judge.) See Smith v. Santa Rosa Island Auth., 729 So. 2d 944 (Fla. 1st DCA 1998).

A. RULE 2.330(d), FLA. R. JUD. ADMIN. (former 2.160)

Rule 2.330(d) sets forth the following bases for a disqualification motion:

1. the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
2. the judge before whom the case is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto or is interested in the result thereof;
3. the judge is related to an attorney or counselor of record in the cause by consanguinity or affinity within the third degree; or
4. the judge is a material witness for or against one of the parties to the cause.

B. SECTION 38.10, FLORIDA STATUTES (2006)

1. Whenever a party makes and files an affidavit stating fear that the party will not receive a fair trial on account of prejudice of the judge, the judge shall proceed no further, but another judge shall be designated.
2. Every affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.
3. Requirements consistent with Rule 2.330, Florida Rules of Judicial Administration.

4. When a judge has disqualified himself/herself, second judge is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties.

Note: Section 38.10, Florida Statutes, does not apply to appellate judges.

In re Estate of Carlton, 378 So. 2d 1212 (Fla. 1979). An appellate judge must determine for himself/herself both the legal sufficiency of a motion to disqualify the judge and the propriety of withdrawing in any particular circumstance. Id.; see also Adams v. Smith, 884 So. 2d 287 (Fla. 2d DCA 2004).

C. HOW TO HANDLE A MOTION FOR DISQUALIFICATION

1. **STOP WHAT YOU ARE DOING IN THE CASE AND RULE ON THE MOTION.** In addition to filing with the clerk, the movant shall immediately send a copy of the motion to the subject judge for "immediate ruling." Fla. R. Jud. Admin. 2.330(c), (e). A judge is "faced" with a motion for disqualification when the motion is filed with the clerk. "A judge faced with a motion for disqualification should first resolve that motion before making any other rulings in a case." Loevinger v. Northrup, 624 So. 2d 374 (Fla. 1st DCA 1993). See also Valdes-Fauli v. Valdes-Fauli, 903 So. 2d 214 (Fla. 3d DCA 2005); Hoffman v. Crosby, 908 So. 2d 1111 (Fla. 1st DCA 2005); Berkowitz v. Rieser, 625 So. 2d 971 (Fla. 2d DCA 1993); Airborne Cable Television, Inc. v. Storer Cable TV of Florida, Inc., 596 So. 2d 117 (Fla. 2d DCA 1992). IT IS ERROR TO TAKE ANY OTHER ACTION IN THE CASE BEFORE RULING ON THE MOTION TO DISQUALIFY. Shah v. Harding, 839 So. 2d 765 (Fla. 3d DCA 2003) (granting a new trial because trial judge failed to follow the proper procedure in consideration of a disqualification motion, by ruling on the motion after deciding the merits of the case); Brown v. State, 863 So. 2d 1274 (Fla. 1st DCA 2004) (once motion to disqualify is filed, "no further action can be taken, even if the trial court is not aware of the pending motion"). While a motion to disqualify is pending, the trial court is not authorized to rule on other pending motions and all such motions that the trial court does rule upon during this period must be vacated. Gomez v. State, 900 So. 2d 760, 761 (Fla. 4th DCA 2005); Elegele v. Halbert, 890 So. 2d 1272, 1274 (Fla. 5th DCA 2005).
2. **DISQUALIFICATION MOTION MUST BE RULED ON IMMEDIATELY BUT NO LATER THAN 30 DAYS FOLLOWING ITS PRESENTATION TO THE COURT.** Fla. R. Jud. Admin. 2.330(j); Tableau Fine Art Group, Inc. v. Jacoboni, 853 So. 2d 299 (Fla. 2003). Rule 2.330(c), Florida Rules of Judicial Administration, requires a party to file the motion to disqualify with the Clerk's Office in addition to "immediately serv[ing] a copy of the motion on the subject judge" by mail

to the judge's chambers. Tobkin v. State, 889 So. 2d 120 (Fla. 4th DCA 2004).

IF THE JUDGE FAILS TO RULE ON THE MOTION TO DISQUALIFY WITHIN 30 DAYS AFTER SERVICE OF THE MOTION, THE MOTION IS DEEMED GRANTED AND THE MOVING PARTY MAY SEEK AN ORDER OF THE COURT DIRECTING THE CLERK TO REASSIGN THE MOTION. Fla. R. Jud. Admin. 2.330(j); Gomez v. State, 900 So. 2d 760 (Fla. 4th DCA 2005).

However, note an exception to this rule – If the movant fails to serve a copy of the motion to disqualify on the judge as required by rule 2.330(c) and as a result, 30 days passes without the judge making a ruling, then rule 2.300(j) is not implicated. Harrison v. Johnson, 934 So. 2d 563 (Fla. 1st DCA 2006).

3. A motion to disqualify a judge must be decided by the judge to whom the motion is directed. Roy v. Tomlinson, 639 So. 2d 1112 (Fla. 1st DCA 1994).

4. SAY NOTHING AND TAKE THE MOTION TO CHAMBERS.
THREE RULES:

DO NOT TAKE IT PERSONALLY
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- a. Expressing displeasure with attorney for bringing motion to disqualify may be considered intimidation. See Mard v. Freeman, 688 So. 2d 455 (Fla. 5th DCA 1997). After receiving an oral motion to disqualify, the judge allegedly ordered the attorney into chambers and advised him that he (the judge) "had a very strong dislike for anyone who demonstrated such unprofessional behavior and challenged his (the judge's) authority and that attorneys in his courtroom paid a price for such behavior." The judge later denied a motion to disqualify containing these allegations. Pinnacle Ins. Co. v. Freeman, 687 So. 2d 989 (Fla. 5th DCA 1997). See also Martin v. State, 820 So. 2d 403 (Fla. 3d DCA 2002) (Judge's comment to defense attorney that the attorney's initial motion for judge's disqualification "was filled with defense counsel's personal convictions" required judge's disqualification because it created an "intolerable adversary atmosphere.")
- b. DO NOT HOLD A HEARING. Ruling on a motion for disqualification "does not require a hearing, oral argument, the presentation of evidence, or a review of prior court proceedings. The legal sufficiency of the motion and affidavits is purely a question of law." Larimer v. State, 50 Fla. Supp.2d 13 (Fla. 5th Cir. Ct. 1991).

The danger of holding a hearing is illustrated by Clark Auto Leasing & Rentals, Inc. v. Lupo, 547 So. 2d 1016 (Fla. 4th DCA 1989), where the trial judge denied the motion and then, at the request of plaintiff's counsel, administered an oath to permit counsel to address and refute the factual allegations in the motion and affidavits. The appellate court ruled, "Although the trial judge stressed that her ruling was based upon the legal sufficiency of the motion and affidavits, the transcript reveals that she indirectly took an active role in addressing the truthfulness of the allegations." Therefore, the writ of prohibition was granted. Another example is Cave v. State, 660 So. 2d 705 (Fla. 1995), in which the court called witnesses to rebut the defendant's allegations contained in his motion to disqualify. Notwithstanding the fact that the motion may have been deficient, the murder conviction was reversed.

In Nathanson v. Nathanson, 693 So. 2d 1061 (Fla. 4th DCA 1997), the trial judge was disqualified for improperly allowing the guardian ad litem to respond regarding the truthfulness of the allegations in the motion to disqualify.

IF you do hold a hearing (strongly discouraged), you must assume that the facts in the motion are true and you should limit argument to the issue of whether the stated grounds are legally sufficient to require disqualification. If you dispute the facts in the motion, that alone will require you to disqualify yourself. See Randolph v. State, 626 So. 2d 1006 (Fla. 2d DCA 1993) (The trial judge conducted a hearing on the motion to disqualify and asked if the prosecutor wished to be heard. The prosecutor made comments which were inappropriate because they went beyond the question of the legal sufficiency of the motion. Nonetheless, the appellate court ruled that "the prosecutor's comments. . . should not be attributed to the trial judge." The trial court's denial of the motion was affirmed because the judge ruled on the motion without disputing the facts.); Niebla v. State, 832 So. 2d 887, 888 (Fla. 3d DCA 2002) (Although it is impermissible for a trial judge to refute the charges in a motion to disqualify, a court is permitted to state the status of the record. Held: Trial judge could state that he imposed consecutive life sentences after defendant's trial.); Shuler v. Green Mountain Ventures, Inc., 791 So. 2d 1213, 1215 (Fla. 5th DCA 2001) (explaining that while a trial judge may not pass on the facts of the truth alleged, the judge may explain the status of the record).

D. DETERMINE PROCEDURAL REGULARITY

1. Procedural requirements for motion to disqualify pursuant to Rule 2.330, Florida Rules of Judicial Administration. Motion must:
 - i) be made by a party;
 - ii) be in writing;